

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Comprehensive Review of Universal Service Fund)	WC Docket No. 05-195
Management, Administration, and Oversight)	
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	
)	
Schools and Libraries Universal Service)	CC Docket No. 02-6
Support Mechanism)	
)	
Rural Health Care Support Mechanism)	WC Docket No. 02-60
)	
Lifeline and Link-Up)	WC Docket No. 03-109
)	
Changes to the Board of Directors for the)	CC Docket No. 97-21
National Exchange Carrier Association, Inc.)	

COMMENTS OF IDT TELECOM, INC.

Tamar E. Finn, Esq.
Douglas D. Orvis II, Esq.
SWIDLER BERLIN LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7500 (Tel)
(202) 424-7647 (Fax)

Counsel for IDT Telecom, Inc.

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SUMMARY

IDT Telecom, Inc. (“IDT”) supports the goals and policies surrounding the advancement of Universal Service through the USF. IDT believes that the Universal Service Administrative Company (“USAC”) has, on balance, performed acceptably in its performance as Administrator. However, USAC appears to operate with greater independence from the Commission that the rules would appear to allow. To that end, USAC’s actions can appear to effectively create policy, which exceeds USAC’s authority. IDT believes that many of these problems can be remedied through greater transparency of USAC processes, and greater public supervision by the Commission.

In its comments, IDT reviews USAC’s overall performance, as well as offering specific comments on the contribution process, audit process and proposed changes to the record retention and audit limitations for contributors.

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COMMENTS OF IDT TELECOM, INC.

I INTRODUCTION

IDT Telecom, Inc. (“IDT”), by its undersigned counsel and in response to the Commission’s Notice of Proposed Rulemaking (“NPRM”) released June 14, 2005,¹ offers its comments on the overall performance of the Universal Service Administrative Company (“USAC”) in its capacity as Administrator of the Universal Service Fund (“USF”). As outlined in greater detail below, IDT supports the goals and policies surrounding the advancement of Universal Service through the USF.

¹ Comprehensive Review of Universal Service Fund Management, Administration, and Oversight, Federal-State Joint Board on Universal Service Schools and Libraries Universal Service Support Mechanism, Rural Health Care Support Mechanism, Lifeline and Link-Up, Changes to the Board of Directors for the National Exchange Carrier Association, Inc., WC Docket No. 05-195, CC Docket No. 96-45, CC Docket No. 02-6, WC Docket No. 02-60, WC Docket No. 03-109, CC Docket No. 97-21, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, rel. June 14, 2005.

IDT is a global telecommunications company with its corporate headquarters in Newark, New Jersey. With offices in 17 countries, IDT serves both wholesale and retail customers, with a focus on international calling. IDT is a leading provider of calling cards and also provides residential local and long distance service and a new wireless offering. As a licensed carrier and provider of Telecommunications Services, IDT is a mandatory contributor to the USF under Section 254 of the Act.²

As noted above, IDT generally supports the aim of Universal Service and the USF. IDT believes that USAC has, on balance, performed acceptably in its performance as Administrator. However, USAC appears to operate with greater independence from the Commission than the rules would ordinarily allow. To that end, USAC's actions can effectively create policy, in violation of the limitations placed on it by the Commission.³ IDT believes that many of these problems can be remedied through greater transparency of USAC processes, and greater supervision by the Commission.

In addressing these twin aims of greater transparency and Commission oversight, IDT offers specific proposals on revising USAC's overall management of the USF, the USF contribution process, USAC's audit procedures and limitations on audits. As detailed below, IDT believes that many of the current shortcomings in USF administration can be overcome with greater Commission oversight and a renewed focus on transparency in USF administration.

II GENERAL OVERVIEW OF MANAGEMENT OF THE USF (USAC'S PERFORMANCE)

IDT believes that USAC has performed acceptably as an Administrator given its size and the complexity of the programs it administers with limited resources. However, as with any

² 47 U.S.C. § 254 (requiring all providers of telecommunications services to contribute in an equitable and non-discriminatory manner).

³ 47 C.F.R. § 54.700, *et seq.*

organization of USAC's size and scope of responsibilities, there is always room for improvement. Therefore, IDT would like to take this opportunity to share its views on how the FCC can help USAC improve its processes.

IDT has observed that USAC, in trying to find a way to cope with the enormous responsibilities of managing the USF, has created internal guidelines. The problem arises when these internal policies begin to affect the way USAC interacts with contributors, especially when USAC begins to make demands of contributors that are not clearly delineated in any FCC rules or regulations. It is at this point that the internal guidelines become *de facto* policy, and USAC begins to exceed the authority granted it by the FCC. The FCC's rules clearly state that USAC "may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress."⁴ Yet, as demonstrated below, USAC's internal guidelines have resulted in several instances of new "policy," and burdens being placed on carriers not clearly imposed by the FCC's rules.

IDT believes that the FCC must step in and either amend its rules, or issue additional guidance in the context of this rulemaking, to ensure that USAC operates within the parameters established by the FCC. One area requiring improvement is the lack of transparency in USAC's decision-making processes. This problem arises in several contexts. For instance, in the context of an audit, USAC might make an internal decision on how to handle certain situations without ever telling the contributor. In other contexts, USAC may unilaterally reject timely filed revenue information, and use a USAC-generated estimate of revenue. Sometimes all the contributor sees of this decision, if anything, is an invoice reflecting the estimate. The contributor may have no basis on which to form an appeal, since there is no record of how USAC arrived at its result. USAC must be required to clearly delineate how it arrived at decisions, and provide contributors

⁴ 47 C.F.R. § 54.702(c).

notice of their rights to appeal. USAC's decisions should also be made public so that other contributors might know how USAC is interpreting the FCC's rules and administering them. While business sensitive information of the contributors should be kept confidential, the overall decisions could be made available in redacted form so that all contributors may see and understand USAC's positions.

Further, to ensure transparency the FCC should require that all of USAC's internal guidelines be made publicly available. USAC, as an administrator of the FCC's rules, is acting in a quasi-governmental fashion, and should be held to a higher standard of openness. In response to the FCC's request in this proceeding, USAC has provided a list of over one hundred administrative procedures that it has developed for the contributions process and the High Cost, Low Income, and Rural health Care programs.⁵ While USAC has provided the title of these procedures and the general areas they cover, it still has not given any details of what these procedures are. Yet these administrative procedures affect directly the way that USAC reviews USF contributions, administers funds, and implements the FCC's rules.

USAC's development and use of undocumented administrative procedures to interpret and implement the FCC's USF rules is unfair to those carriers and entities that must somehow comply with them without knowing them. For example, the record retention rule requires that filers keep data used to complete the Form 499-A for a period of three years.⁶ However, there are no rules or guidelines specifying what types of data must be retained. If USAC expects filers to keep specific data in their records, then it must make publicly available its guidelines outlining

⁵ See Letter to Ms. Marlene H. Dortch, Federal Communications Commission, from D. Scott Barash, Vice President and General Counsel, USAC, filed September 16, 2005 in FCC Docket No. 05-124 ("USAC Ex Parte")

⁶ 47 C.F.R. § 54.711(a) ("Contributors shall maintain records and documentation to justify information reported in the Telecommunications Reporting Worksheet, including the methodology used to determine projections, for three years and shall provide such records and documentation to the Commission or the Administrator upon request."); see section V., *infra*.

the types of data that must be retained under the three-year record retention rule. In the absence of such information, a filer should not be penalized for its inability to guess as to unilateral requirements set by USAC.

As another example, USAC charges a late fee on carriers who withhold contribution during an appeal of a USAC decision. USAC's internal administrative procedures allow it to ostensibly charge interest on the disputed amount even if USAC's decision is proven to be wrong on appeal.⁷ There is no basis in the FCC's rules for USAC to be able to collect these late fees and it defies fundamental notions of due process to grant USAC the benefit of a late fee when the basis for its position is ultimately unfounded.

Congress implemented the Administrative Procedures Act ("APA")⁸ for the very purpose of ensuring that when governmental organizations implement statutes, those that are affected by the statutes are aware of the implementing rules, can provide notice and comment on them, and appeal them if not in harmony with the underlying statute. Likewise, USAC, in developing administrative procedures to implement the FCC's rules, should also have its procedures be subject to a notice and comment cycle where the contributors and recipients of funds can review the procedures and ensure that they are in compliance with the FCC's rules. The most transparent and safest way to ensure that USAC's administrative procedures comply with the FCC's rules would be for the FCC to put out for notice and comment any USAC administrative procedures used to implement the FCC's rules, and then the FCC to publish these procedures as part of their rules governing USAC.

⁷ USAC brazenly describes this action as standard operating procedure on its website, <http://www.universalservice.org/serviceprovider/contributorappeals.asp>.

⁸ 5 U.S.C. § 551, *et seq.*

III USAC'S OVERSIGHT OF THE CONTRIBUTION PROCESS

Some of the most controversial issues involved with the contribution process have revolved around the FCC Form 499-A used for determining what should be in a carrier's USF contribution base. IDT has noted instances where the instructions on the Form 499-A are contrary to the FCC's binding regulations, and the public has not been given an opportunity to provide comment on these instructions. In such instances, USAC should be required to implement the regulations as written, not as interpreted by the form's instructions. It is axiomatic that an FCC form's instructions are invalid if they attempt to re-write existing FCC rules without the requisite opportunity for notice and comment required by the APA.⁹

Another area of concern with the Form 499-A instructions is their inconsistency with the FCC's rules governing the reporting of international traffic and revenue. For example, an international carrier reports its international traffic and revenues data in accordance with Section 43.61 of the Commission's rules and the associated Filing Manual for International Data. The same carrier reports its Form 499-A revenue in accordance with the FCC's regulations and USF Orders. The instructions on Form 499-A state that, in most cases, international traffic reported on the Form 499-A should equal the international revenue reported on the international traffic and revenue reports filed in accordance with Section 43.61 of the Commission's rules.¹⁰ Nonetheless, there are numerous circumstances in which this would simply not be possible while complying with other aspects of the Form 499-A instructions and/or with the Manual for the Reporting of International Traffic and Revenue, the instruction manual for filing of reports filed under Section 43.61.¹¹ The Form 499-A even acknowledges possible discrepancies.¹² Such

⁹ 5 U.S.C. § 551, *et seq.*

¹⁰ 47 C.F.R. § 43.61. For an example of the instruction, *See, e.g.*, 2005 FCC Form 499-A, Instructions at 19.

¹¹ This manual is available online at www.fcc.gov. The current version was published in 1995.

discrepancies are inherently unavoidable, as the Section 43.61 report and the Form 499-A serve different purposes and are governed by different rules.

The Section 43.61 report is concerned only with a carrier's international revenue. More critically, the Section 43.61 report seeks details about the manner in which carriers carry traffic internationally (*i.e.*, facilities-based, facilities-resale and pure resale) and the settlement rate or settlement-like rate that a carrier may pay to terminate that traffic. The FCC uses this information to monitor rates paid by U.S. carriers to prevent violations such as whipsawing, and discrimination against U.S. carriers (particularly by incumbent Post Telephone and Telegraph ("PTTs") administrations). Revenue data is often derived based on the routing and destination. For calls where the routing may not be known, FCC staff has provided guidance to carriers that it would be appropriate for a carrier to allocate calls based on the carrier's known traffic pattern, and approximate the associated revenue.

By comparison, the Form 499-A is focused primarily on revenue. The Form 499-A instructions clearly call for carriers to match their reported revenues to their books of account.¹³ The instructions even provide that a carrier is permitted to use allocations between jurisdictions based on past experience when actual traffic data is not available, which can be contrasted with Section 43.61 reports which include historical revenue derived from switch records.¹⁴ In short, the Form 499-A and the Section 43.61 reports are rarely directly related. The reports have different purposes, different instructions and different requirements. While the underlying data used may be related, that is where the similarities end.

¹² See, *e.g.*, 2005 Form 499-A, Instructions at 19.

¹³ Form 499-A, Instructions, at 17.

¹⁴ *Id.* at 20. Further, as the Form 499-A is due on April 1 and the Section 43.61 report is due on July 31 of each year, carriers often find that precise traffic data may not be available in time for the Form 499-A deadline.

As a result, the Form 499-A instructions often are in conflict with the requirements of Section 43.61 and the applicable FCC orders on traffic reporting and universal service. To the extent that an instruction on the Form 499-A contradicts or is otherwise inconsistent with FCC regulations or orders by the FCC, that instruction should be invalid unless it was subjected to the rigors of the APA, as described above. USAC should be clearly informed that it cannot require that a carrier's international revenue reported on the Form 499-A match its international revenue reported in the Section 43.61 reports.

In summary, the FCC should ensure that the instructions for Form 499-A are consistent with its regulations, and put out the instructions for notice and comment each time it changes them. In addition, if the Form 499-A instructions are changed, in conducting audits USAC should not be allowed to retroactively apply the new instructions to filings made in previous years. To the extent a previous Form 499-A's instructions are ambiguous or not consistent with regulations, and those instructions were not put out for public comment, USAC should be required to rely on existing rules, policies and regulations for guidance in cases of inconsistency.

IV THE USAC AUDIT PROCESS NEEDS TO BE REGULATED AND MADE TRANSPARENT

As an initial matter, IDT supports the audit processes within USAC to ensure that contributing carriers pay their fair share to support the goals of Universal Service. Similarly, recipients of funds, including both ETCs and participants in the Schools and Libraries program, should be subject to review, especially given the recently publicized examples of abuse within the E-rate program. Such audits are essential to ensure that the fund is funded in an equitable and non-discriminatory manner from all telecommunications carriers, as mandated by the Act, but also to prevent the raiding of the fund by fraud and abuse by recipients of funds.

Transparency is critical in the audit process, not only because clear and publicized guidance

gives carriers an opportunity to conform their actions to the audit guidelines, which will make the audit process more efficient, but also because audit procedures have the effect of making *de facto* policy, as they can substantively affect carriers' obligations under the USF system.

USAC audits should be conducted in an efficient manner and consistent with FCC rules and/or the Form 499 instructions. USAC's audits, now conducted by USAC's internal auditors, appear to often be conducted with little or no direct FCC input on USAC's actions; or worse, if the Commission is providing USAC with guidance, it is being done in secret without public disclosure or transparency. IDT supports a more transparent audit process from beginning to end, including published audit guidelines,¹⁵ specific, published guidance from the Commission, and time limitations on the completion of audits. These principles should apply generally to all audits conducted by USAC, including contributor and recipient audits.

With regards specifically to Contributor audits, IDT believes the Commission should give clear direction to USAC on the conduct during the audits. Under the current system, USAC apparently receives little to no Commission guidance on its conduct, or if it does receive guidance, it is done non-publicly. Neither option is preferred. If USAC is not receiving guidance, it is essentially permitted to make policy through decisions made while conducting a specific audit.¹⁶ If the Commission is providing audit guidance that can substantively effect a carriers' obligations, then it is appropriate for such *de facto* policy making to be done in the open and subject to comment and review.

IDT's first suggestion is that where the Commission's rules or Form 499-A instructions are not clear concerning issues that arise in audits, such as the appropriate back-up documentation auditors expect to be produced to support the reporting done on the Form 499-A,

¹⁵ IDT notes that USAC listed operational audits, but not contributor audit guidelines in its lists of procedures filed in the *USAC Ex Parte*.

¹⁶ It is axiomatic that the Administrator is not empowered to make policy. 47 C.F.R. § 54.702(c).

USAC should make public its internal guidelines, so that carriers will know specifically what auditors would expect to view during the audit process. More generally, to the extent that USAC relies on these guidelines during its audits, they must be made public as they have the effect of creating substantive changes to a carrier's obligations. Similarly, if the Commission staff reviews or otherwise guides USAC on these guidelines, such *de facto* policy making should be open to notice and comment under the rigors of the APA.

To the extent that audit guidelines are not made public, or not subject to Commission review, then any carrier actions that do not comply with these guidelines, but that do not violate any of the Commission's rules, should only be noted in any audit report and not be subject to an adjustment in contribution or support amount. Otherwise, carriers would be subject to what would amount to essentially "secret law," as the carrier would be essentially punished for not complying with unknown audit guidelines. While IDT prefers that the audit guidelines would be made public and that greater transparency be implemented into the audit process, IDT believes that limiting the financial impact of unpublished audit guidelines is a reasonable "second best" alternative.

The audit process itself should be reformed to give carriers a greater opportunity to respond to USAC's audit reports. Under the current system, USAC staff issues a draft report and invites comments. USAC then responds to the carrier's comments and takes the finalized report to USAC's Board of Directors for approval. The approval from the Board of Directors is done virtually in secret, in either executive session or with reference to an assigned audit number, unknown even to the carrier being audited. USAC should be directed to offer carriers an opportunity to address the USAC Board of Directors, in writing, or in person, in executive session if necessary to protect a carrier's confidentiality. Such an opportunity gives the carrier a

chance to address any further errors in USAC's final audit report, but also provides a benefit for the entire USF system because it gives the Board of Directors an opportunity to hear directly from a carrier that may have concerns with the accuracy of audit conclusions. Such an approach may also reduce appeals to the Commission, as the Board may be able to correct errors in audit reports that otherwise would only be considered through the lengthy appeal process.

Next, the Commission should impose a one-year limitation for the completion of audits. USAC audits may extend for limitless periods of time. USAC's audits can linger, often lasting more than a year. For carriers, a prolonged audit is expensive and disruptive, as multiple USAC site visits need to be accommodated by a carrier's staff, who must assist USAC's auditors in addition to their normal duties. For carriers that are publicly traded, a lengthy, publicly-disclosed audit could lead to a carrier facing a substantial decrease in stock price, thus increasing its operating costs through an increase in capital costs, while the financial community attempts to digest the significance of a USAC audit. When USAC audits linger, this effect is magnified.

The NPRM also suggests that contributors pay for and submit themselves to regular independent audits,¹⁷ and otherwise implies that carriers should bear the costs associated with USAC audits. Such requirements would be overly burdensome and possibly cost prohibitive, especially to smaller carriers. Moreover, it is not clear that sufficient numbers of competent independent auditors can be located. Prior to USAC's internal audit division assuming the role of auditing carriers, the function was out-sourced to an accounting firm, who experienced an extensive learning curve as their auditors attempted to understand the complexities of the USF. Requiring all carriers to hire independent auditors is essentially a step backwards for fund administration, as carriers will be forced to bear the costs of educating auditors on the nuances of USF policy.

¹⁷ *NPRM*, at ¶ 80.

While USAC's internal audit division appears to perform the audits faster and with more consistency than did the outside accounting firm, cost controls should remain an important consideration. If carriers were forced to essentially pay for their own audits, then USAC's auditors would have absolutely no limitation on their expenses. Such a system is an open invitation to abuse and inefficiency and should be rejected outright. USAC already recoups its administrative costs, including audit expenses, through the contributions of carriers on a not-for-profit basis.¹⁸ To the extent that audit costs increase, USAC can increase its budget for expenses, subject to the appropriate review and oversight of the Commission. Such a system ensures that the Commission properly supervises USAC, and that USAC is encouraged to run an efficient, yet subsidized, operation.

V ADMINISTRATIVE LIMITATION PERIOD FOR AUDITS

The Commission also seeks comment on creating a five-year limitation on contributor audits, to mirror the five-year audit requirement for E-rate audits.¹⁹ IDT believes that the current, *de facto* limitation of three years is sufficient to supervise the fund, and does not overly burden carriers with record retention requirements. As such, IDT believes that the Commission should affirmatively reiterate the *de facto* three limitation currently in effect. If, however, the Commission does adopt a five-year audit limitation, it should be phased in over two years to coincide with the expansion of the current record retention guidelines, which are only three years.

As an initial matter, the Commission should clarify that its existing policy limits audits to three year to correspond with the three-year record retention requirement. In February 2002, the Commission amended Section 54.711 of its rules to institute a three-year record retention

¹⁸ 47 C.F.R. § 54.709.

¹⁹ *NPRM*. at ¶ 83, *et seq.*

requirement.²⁰ Specifically, a carrier is required to retain records relating to its Form 499 filings for a period of three years and to provide those documents to USAC on request.²¹ Logically, therefore, the FCC clearly intends for there to be a three-year limitation on audits of Form 499-A filings, as it did when it specifically tied the record retention limits and the audit limitations.²² Yet, there remains confusion because isolated dicta in a Division Order implies that USAC has virtually unfettered discretion in its audits.²³ This dicta pre-dates the Commission's creation of a record retention requirement and should be considered superceded by the creation of a specific record retention policy. Such an interpretation is common sense, because absent records to audit, there would be nothing for USAC to review, it is only logical that a record retention limit would create an effective limitation on audits.

An expansion of audit authority to five years would naturally include a corresponding increase in the record retention requirements. The Commission should note that such an expansion creates an extensive burden on companies who must retain these records.²⁴ Extensive record storage can burden a carrier's systems and storage capacity (both electronic and physical), and otherwise increases costs. Thus, maintaining a general three-year retention requirement is consistent with Commission policy and does not unduly burden carriers.

²⁰ *Federal-State Joint Board on Universal Service*, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, 98-170, Further Notice of Proposed Rulemaking and Report and Order, FCC 02-43 (rel. Feb. 26, 2002).

²¹ 47 C.F.R. § 54.711(a).

²² *Schools and Libraries Universal Service Support Mechanism*, CC Docket 02-6, Fifth Report and Order and Order, FCC 04-190, ¶ 32 (rel. Aug. 13, 2004).

²³ *Federal-State Joint Board on Universal Service; Requests for Waiver of Section 54.717 of the Commission's Rules* Filed by: Universal Service Administrative Company School's and Library Division Rural Health Care Division, CC Docket 96-45.


²⁴ Such retention is made more difficult given that the audit guidelines haven't been publicized, leaving carriers to guess what a USAC auditor may want to review. Thus, the natural tendency would be to over-retain data, further burdening carriers.

If the Commission does decide to expand the audit limitation and the record retention guidelines, it should be phased in over time. Carriers may not have records sufficient to complete audits more than three years ago, which could lead a USAC auditor to make arbitrary findings based on a perceived lack of compliance with a Commission rule. To account for any records that may have been lawfully purged, the Commission should, if it chooses to adopt a five-year limitation, phase that requirement in over two years. For instance, during the first year, USAC would be permitted to conduct audits for three years. After one year, that limit would be expanded to four years, and after two years, the rule would go into effect fully, at a five year limitation. Such a phase-in is appropriate given the existing record retention requirements and the *de facto* three year limitation on audits.

VI CONCLUSION

IDT believes that USAC has performed acceptably as Administrator, however, the Commission can improve USAC's performance by demanding greater transparency of USAC's procedures, particularly in the audit and contribution context, and through increasing the Commission's oversight of USAC.

Respectfully submitted,



Tamar E. Finn, Esq.
Douglas D. Orvis II, Esq.
SWIDLER BERLIN LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7500 (Tel)
(202) 424-7647 (Fax)

Counsel for IDT Telecom, Inc.

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